	)	**IN THE UNITED STATES COURT OF**
	)	**MILITARY COMMISSION REVIEW**
UNITED STATES,	)	
	)	BRIEF ON BEHALF OF APPELLEE
Appellee,	)	
	)	CMCR Case No. 09-001
v.	)	
	)	
ALI HAMZA AHMAD SULIMAN, AL BAHLUL,	)	Tried at Guantanamo Bay, Cuba
	)	7 May 2008 – 3 Nov 2008
	)	before a Military Commission
Appellant.	)	convened by Hon. Susan J. Crawford
	)	
	)	
	)	Presiding Military Judge
	)	Colonel P. Brownback, JA, USA
	)	Colonel R. Gregory, USAF
	)	
	)	DATE: 21 October 2009

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF MILITARY COMMISSION REVIEW

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Captain, JAGC, U.S. Navy

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was sent by electronic mail to Mr. Michel Paradis, detailed appellate defense counsel, on this 30th day of October, 2009.

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ISSUES PRESENTED

I. DID APPELLANT'S PROSECUTION FOR SOLICITATION IN VIOLATION OF 10 U.S.C. § 950u VIOLATE THE FIRST AMENDMENT?

II. DID THE MILITARY COMMISSION THAT TRIED APPELLANT HAVE JURISDICTION OVER THE CHARGES?

III. DOES APPELLANT'S CONVICTION FOR PROVIDING MATERIAL SUPPORT FOR TERRORISM IN VIOLATION OF 10 U.S.C. § 950v(b)(25) VIOLATE THE EX POST FACTO CLAUSE?

IV. IS THE MILITARY COMMISSIONS ACT OF 2006 AN UNCONSTITUTIONAL BILL OF ATTAINDER?

V. DOES THE MILITARY COMMISSIONS ACT OF 2006 DISCRIMINATE AGAINST ALIENS IN VIOLATION OF THE EQUAL PROTECTION COMPONENT OF THE FIFTH AMENDMENT?

STATEMENT OF STATUTORY JURISDICTION

This Court has jurisdiction to review the record in each case referred to it by the convening authority under 10 U.S.C. § 950c with respect to any matter of law raised by the accused. 10 U.S.C. § 950f(c). Such review is limited to questions of law. *Id.* at § 950f(d). This case has been properly referred to this Court pursuant to 10 U.S.C. § 950c(a).

STATEMENT OF THE CASE

A military commission, duly convened under the Military Commissions Act of 2006 ("MCA"), 10 U.S.C. §§ 948a *et seq.*, convicted Appellant, contrary to his pleas, of: (1) conspiring with Usama bin Laden, Saif al'Adl and others to murder protected persons, attack civilians, attack civilian objects, murder and destroy property in violation of the law of war, commit terrorism, and provide material support for terrorism; (2) soliciting various named and unnamed people to commit these same offenses; and (3) providing material support and

resources to al Qaeda, an international terrorist organization.[1] He was sentenced to life imprisonment. The convening authority approved the findings and sentence as adjudged.

At trial, Appellant enjoyed *inter alia*, the following rights, which greatly exceeded the rights historically accorded to unprivileged enemy combatants accused of war crimes, *see, e.g.*, Rules of Procedure, Nuremberg Trial Proceedings, Vol. 1;[2] Regulations for the Trial of War Criminals, Royal Warrant 0160/2498, A.O. 81/1945 (Jun. 18, 1945), *reported in* Nuremberg Trials Final Report, Appendix E: Royal Warrant - Regulations for the Trial of War Criminals:[3]

1. To be assisted by counsel, 10 U.S.C. § 948k (a), (c); § 949a(b), (c); § 949c(b);

2. No to be compelled to testify at trial, *id.* at § 948r;

3. To obtain witnesses and evidence, and to have exculpatory evidence in the Government's custody and control produced, § 949j;

4. To present evidence, cross-examine witnesses, examine and respond to the Government's evidence, and be present at all sessions, § 949a;

5. To be presumed innocent and convicted only on evidence of guilt beyond a reasonable doubt, § 949l;

6. To have the findings and sentence reviewed by the convening authority, who has authority to set aside any finding and reduce, but not increase, the sentence, § 950b; and

7. To appellate review, §§ 950c, 950f, 950g.

[1] By exception from the specification under Charge I, the Commission acquitted Appellant of the allegation that, in furtherance of the conspiracy, he had "[a]rmed himself with an explosive belt, rifle, and grenades to protect and prevent the capture of Usama bin Laden." The Commission also excepted the same words from the specification under Charge III. R. 916-17.
[2] Available at http://avalon.law.yale.edu/imt/imtrules.asp.
[3] Available at http://avalon.law.yale.edu/imt/imtroyal.asp.

STATEMENT OF FACTS

Knowing al Qaeda was an international terrorist organization dedicated to attacking indiscriminately the United States and its citizens, Appellant travelled to Afghanistan in 1999 to join al Qaeda. R. 511-12, 652-53. There, he met Saif al'Adl, head of al Qaeda's security committee, and attended a terrorist training camp. R. 647, 654. He subsequently met Usama bin Laden, al Qaeda's leader, and pledged "*bayat*" (i.e. fealty) to him, R. 510, 513, becoming a member of al Qaeda. R. 492.

He served as bin Laden's personal secretary, taking the minutes of al Qaeda meetings, preparing correspondence, and conducting research and drafting speeches for bin Laden. He became responsible for al Qaeda's media efforts to disseminate its message, attract recruits, indoctrinate trainees, and motivate the rank and file. In the course of these efforts, he produced a video entitled *The Destruction of the American Destroyer Cole*,[4] ("COLE video") which capitalized, and was intended to capitalize, on al Qaeda's successful attack on USS COLE to recruit new members. R. 520, 534, 588, 652. In addition, he arranged for two 9/11 hijackers, Muhammed Atta and Ziad al Jarrah, to swear *bayat* to bin Laden, and prepared "martyr's wills" for them, which were to be used for propaganda and recruiting purposes. R. 554-56.

ARGUMENT

I. APPELLANT HAS WAIVED ASSIGNMENTS OF ERROR ("AOE") I, III, IV AND V AND IS THEREFORE ENTITLED TO NO RELIEF ON THOSE GROUNDS.

[4] Appellant's brief refers to this video as *The State of the Ummah.* The video itself, however, is entitled *The Destruction of the American Destroyer COLE*.

Appellant waived all motions, defenses or objections (except for lack of jurisdiction or failure to allege an offense)[5] when he failed to raise any issues below. Rule for Military Commissions ("RMC"), Manual for Military Commissions (2007) ("MMC"), 905(e). In addition, Appellant expressly waived "all pretrial motions of any kind." R. 84.

> DC [MAJ FRAKT]: Well, thank you, Your Honor. In accordance with Mr. Al Bahlul's wishes, defense demands, under Rule for Military Commission 707, a speedy trial. **The defense waives all pretrial motions of any kind** and is prepared to go to trial at the soonest possible date.
>
> MJ [COL GREGORY]: Waiving all pretrial motions of any kind; I want to make sure I heard that correctly.
>
> DC [MAJ FRAKT]: **That's correct**, Your Honor.

R. 84 (emphasis added).

Consequently, the only issues Appellant has not waived are allegations the military commission lacked jurisdiction or a charge failed to allege an offense. Of the five purported errors assigned in this Court, only AOE II alleges a ground for relief that has not been waived. The fact AOEs I and III through V assert constitutional violations does not change this result, even assuming the Constitution applies to Appellant, as an accused may waive most constitutional rights. *United States v. Mezzanatto*, 513 U.S. 196 (1995). As the Supreme Court has said, "Rather than deeming waiver presumptively unavailable absent some sort of express enabling clause, we instead have adhered to the opposite presumption. A criminal defendant may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution." *Id.* at 200-01 (citations omitted). *Accord Peretz v. United States*, 501 U.S. 923, 936 (1991)("The most basic rights of criminal defendants are . . . subject to waiver"). Further, none of these waived issues undermine the reliability of the fact-finding process. There is no

[5] The Government does not argue that AOE II, questioning jurisdiction, is waived. RMC 905(b)(1).

reason for further inquiry into these issues where, as here, the judge inquired and Appellant's counsel reaffirmed the waiver.

II. APPELLANT'S COMMUNICATION IS NOT PROTECTED BY THE FIRST AMENDMENT, AND NOTHING IN THE FIRST AMENDMENT BARS HIS CONVICTION FOR CONSPIRACY, SOLICITATION, AND MATERIAL SUPPORT FOR TERRORISM.

A. COMMUNICATIONS OF ALIEN ENEMY COMBATANTS ABROAD ARE NOT PROTECTED BY THE FIRST AMENDMENT.

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. Const. amdt. I. The Amendment leaves unspecified the scope of "the freedom of speech" that Congress may not abridge. It is, however, axiomatic "the unconditional phrasing of the First Amendment was not intended to protect every utterance." *Roth v. United States*, 354 U.S. 476, 482 (1957). *Accord First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978).

The Constitution and its amendments are, first and foremost, a political compact among the people of the United States, adopted "in order to form a more perfect union, establish justice, insure domestic tranquility, **provide for the common defense**, promote the general welfare, and secure the blessings of liberty **to ourselves** and **our** posterity." U.S. Const. preamble (emphasis added). Likewise, "[t]he protection given speech . . . was fashioned to assure unfettered interchange of ideas for the bringing about of political and social change desired by **the people**." *Roth*, 354 U.S. at 484 (emphasis added). The First Amendment, therefore, is not an abstract statement about the Rights of Man, but rather a specific guarantee of the liberties of members of the American polity. As such, it does not protect the speech of enemy aliens abroad.

The Supreme Court recognized the First Amendment does not protect the speech of aliens abroad in *United States ex rel. Turner v. Williams*, 194 U.S. 279 (1904). There, an alien had been excluded from the United States *because he was an anarchist*. Upholding the exclusion against First Amendment challenge, the Court said, ". . . those who are excluded cannot assert the rights in general obtaining in a land to which they do not belong as citizens or otherwise." *Id.* at 292; *Accord United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990).

Subsequently, the Supreme Court has reaffirmed the holding that the First Amendment does not protect aliens abroad. *Kleindienst v. Mandel*, 408 U.S. 753 (1972); *Johnson v. Eisentrager*, 339 U.S. 763 (1950). In *Eisentrager*, the Court rejected the idea that "during military occupation irreconcilable enemy elements, guerrilla fighters, and 'werewolves' could require the American Judiciary to assure them freedoms of speech, press and assembly as in the First Amendment . . ." *Id.* at 784. Likewise, in *Kleindienst*, the Court observed that an alien who had been denied a visa "had no constitutional right of entry." *Kleindienst*, 408 U.S. at 762 (citing *Turner* et al.). Given the facts and the citation to *Turner*, there can be no doubt that, when the Court said the alien had "no constitutional right of entry," it meant especially to deny he had any First Amendment right. Appellant, an alien enemy combatant, waging war against the United States from abroad, is not one of the People to whom our Constitution guarantees the freedom of speech.

(1) THE SUPREME COURT'S DECISION IN *BOUMEDIENE V. BUSH*, 128 S.CT. 2229 (2008), PROVIDES NO BASIS FOR EXTENDING FIRST AMENDMENT PROTECTIONS TO APPELLANT.

Nor does the Supreme Court's decision in *Boumediene v. Bush*, 128 S.Ct. 2229 (2008), dictate a contrary result. First, *Boumediene* establishes only that those detained at Guantánamo

Bay have the privilege of habeas corpus; it does not establish, or compel the conclusion, they enjoy other constitutional rights. The Court reached its decision only after an exhaustive survey of both the Great Writ's history and the Court's own precedents on the scope of habeas corpus jurisdiction, as well as analysis of the practical considerations in extending the Writ to Guantánamo Bay. The Court has not undertaken any such detailed analysis of the extraterritorial application of the First Amendment. Consequently, *Boumediene* is limited to its holding. It does not establish that Appellant enjoys First Amendment rights.

Further, because *Boumediene* did not overrule *Turner* – in fact, it did not even discuss *Turner* – this Court is not at liberty to extend *Boumediene* to the First Amendment, and thereby ignore *Turner's* holding that aliens abroad "cannot assert the rights in general obtaining in a land to which they do not belong as citizens or otherwise." *Turner*, 194 U.S. at 292. "[I]t is [the Supreme Court's] prerogative alone to overrule one of its precedents." *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997).

Even assuming *Boumediene* suggests that the First Amendment protects persons detained at Guantánamo Bay, and *Turner* was not an obstacle, such conclusions would be of no help to Appellant. The relevant question is not whether a military tribunal is obliged to obey the Constitution – certainly, it is – but rather whether the First Amendment prohibited Congress from criminalizing the conduct of which Appellant was convicted.[6] Certainly, if the Amendment

[6] Appellant argues his conduct acquires First Amendment protection it would not otherwise have once a U.S. tribunal undertakes to adjudicate that conduct: "To be clear, Mr. al Bahlul is not claiming First Amendment rights on the battlefield. He is not claiming any affirmative right that he could assert to enjoin the government's ability to wage war by, for example, targeting radio stations." Brief on Behalf of Appellant at 9; "[T]he issue is not whether Mr. al Bahlul enjoyed First Amendment rights on the battlefield. . . The question is not what rights Mr. al Bahlul had in Afghanistan, but the extent to which U.S. courts can punish political speech." *Id.* at 11-12. This argument misunderstands the proper application of the Amendment.

prohibits a commission from convicting Appellant, as he argues, it must *a fortiori* prohibit Congress from criminalizing such conduct. After all, the Amendment is explicitly directed at Congress. The court simply determines (a) whether the accused committed the prohibited conduct, and (b) whether the Constitution prohibits Congress from criminalizing that conduct. The focus is on the conduct, not the adjudication. Here, Appellant, an enemy alien, committed his crimes outside the United States while actively engaged in armed conflict against the United States. Even if *Boumediene* is read as extending First Amendment protection to Appellant at Guantánamo Bay, it certainly does not require the retroactive application of the protection. Because Appellant's conduct was not immunized by the First Amendment at the time he committed his crimes, the military commission could lawfully punish him for that conduct.

(2) NONE OF THE LOWER FEDERAL OR STATE COURT CASES CITED BY APPELLANT SUPPORT THE CONCLUSION THAT ENEMY ALIENS ABROAD ENJOY FIRST AMENDMENT PROTECTIONS.

Appellant concedes the Supreme Court has never held the First Amendment protects the foreign speech of aliens abroad. Brief for Appellant at 10. He contends, however, that lower federal and state courts "have treated the application of the First Amendment in such cases as a virtual given," citing nine cases. *Id.* He relies principally on *United States v. Aguilar*, 883 F.2d 662 (9th Cir. 1989).

The *Aguilar* defendants asserted the trial court erroneously failed to instruct the jury that their communications were protected by the First Amendment unless intended and likely to produce or incite an imminent lawless act. The Ninth Circuit held that, even by the standard advanced by the appellants, they were not entitled to the requested instruction. *Id.* at 684-85. The court, therefore, had no need to decide whether the First Amendment protected the

defendants' conduct. Consequently, *Aguilar* provides no support for Appellant's contention that his overseas criminal conduct is entitled to First Amendment protection.[7]

(3) APPELLANT'S CONVICTION FOR CRIMINAL SOLICITATION DOES NOT CHILL LEGITIMATE FIRST AMENDMENT RIGHTS OF AMERICANS TO RECEIVE INFORMATION FROM ABROAD.

Because the law simply does not support the conclusion he enjoys First Amendment rights as an enemy alien abroad, Appellant attempts to cloak his criminal solicitation in the mantel of Americans' constitutional right to access information. This attempt must fail. First, no one has a right to be solicited to commit a crime, *United States v. Williams*, 128 S.Ct. 1830, 1842 (2008), and the statute Appellant was convicted of violating under Charge II merely prohibits criminal solicitation. This statute, therefore, infringes no American's constitutional rights.

Second, none of the precedents Appellant cites establishes that the First Amendment rights of Americans are infringed by Government efforts to target and suppress overseas enemy communications in wartime.[8] Indeed, Appellant explicitly eschews any argument he could

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[7] The other cases Appellant cites are likewise distinguishable. *American Land Program v. Bonaventura Uitgevers Maatschappij*, 710 F.2d 1449 (10th Cir. 1983) concerned long-arm jurisdiction over a foreign defendant in a slander case. The court explicitly declined to address First Amendment claims in resolving the threshold issue of personal jurisdiction. In *Louise Ferand Int'l SARL v. Viewfinder*, 406 F.Supp.2d 274 (S.D.N.Y. 2005) and *Yahoo! v. La Ligue Contre Le Racisme et L'Antisemitisme*, 169 F.Supp.2d 1181 (N.D. Cal. 2001), the courts refused to enforce French court orders because doing so would infringe First Amendment rights of *U.S. corporations*. In *Mattel v. MCA Records*, 28 F.Supp.2d 1120 (C.D. Cal. 1998), while the court spoke of the First Amendment rights of the defendants, one defendant was a *U.S. corporation*, which undoubtedly had such rights. Further, the court arguable was merely applying substantive U.S. trademark law, which has inextricably incorporated First Amendment principles. *Bryks v. Canadian Broadcasting Co.*, 928 F.Supp.2d 381 (S.D.N.Y. 1996), involved defamation claims against CNN, a *U.S. corporation*; the foreign defendant had been dismissed for lack of jurisdiction. In *DeRoburt v. Gannett*, 83 F.R.D. 574 (D.Haw. 1979), the court held that choice-of-law rules required First Amendment law supplement foreign law where a foreign leader sued a *U.S. corporation* for libel. Finally, in both *Telnikoff v. Matusevich*, 702 A.2d 230 (Md. 1977), and *Bachchan v. India Abroad*, 585 N.Y.S.2d 661 (Sup. Ct. 1992), courts refused to enforce British libel judgments *against U.S. persons or entities* on First Amendment grounds. None of these cases stand for the proposition that enemy aliens abroad enjoy First Amendment rights.

[8] Appellant rests his argument on essentially three precedents, *First Nat. Bank of Boston v. Bellotti*, *supra*, *Kleindienst*, *supra*, and *Lamont v. Postmaster*, 381 U.S. 301 (1965). All three involved *U.S. plaintiffs* challenging purportedly unconstitutional burdens on their *own* First Amendment rights. None involved an alien claiming First

"enjoin the government's ability to wage war." Brief for Appellant at 9. Further, one of the cases Appellant relies on, *Kleindienst,* actually indirectly supports the conclusion the Government is free to target and suppress overseas enemy communications in wartime.

In *Kleindienst,* a Belgian Marxist was denied a U.S. visa. The American university professors who had invited him to speak sued to require the Government to issue him a visa. These citizen plaintiffs asserted their *own* First Amendment rights. While the Court recognized the American professors had First Amendment rights to "access to social, political, esthetic, moral and other ideas and experiences," *Kleindienst,* 408 U.S. at 763, it held that "recognition that First Amendment rights are implicated, however, is not dispositive . . ." *Id.* at 765. The Court went on to say:

> In accord with ancient principles of the international law of nation-states, the Court in *The Chinese Exclusion Case,* 130 U.S. 581, 609 (1889), and in *Fong Yue Ting v. United States,* 149 U.S. 698 (1893), held broadly . . . that the power to exclude aliens is "**inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers – a power to be exercised exclusively by the political branches of government** . . ." Since that time, the Court's general reaffirmations of this principle have been legion. The Court without exception has sustained Congress' "plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden."
>
> * * *

Amendment protection for his overseas speech. Further, Appellant's brief to the contrary notwithstanding, *see* Brief for Appellant at 13 n.3, *Kleindienst* did not recognize that an alien "petitioner could stand in to assert the First Amendment rights of American citizens." After explicitly stating it was clear the excluded alien "had no constitutional right of entry," the Court said the issue was "whether the First Amendment confers upon the *appellee professors* [all U.S. citizens, *see id.* at 759] . . . the ability to determine that [the alien] should be permitted to enter the country . . ." *Id.* at 762 (emphasis added). Nor did the Court "emphasize that it was declining to decide whether an unambiguous case of viewpoint discrimination could have survived First Amendment scrutiny." Brief for Appellant at 13 n.3. The alien had been excluded precisely because immigration law made people who advocated, wrote or published the doctrines of world communism inadmissible, i.e. discriminated against them based on viewpoint. The Court explicitly held Congress had authority to adopt such a law.

> In summary, the plenary congressional power to make policies and rules for exclusion of aliens has long been firmly established. . . Congress has delegated conditional exercise of this power to the Executive. We hold that when the Executive exercises this power negatively on the basis of facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, **nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant.**

Id. at 765-66, 769-70 (citations omitted)(emphasis added).

Like the power to exclude aliens, the power to provide for the common defense and to wage war is "inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers – a power to be exercised exclusively by the political branches of government . . . ." *Id.* at 765 (internal quotations omitted). Consequently, as in *Kleindienst*, this court should refuse to balance Congress' exercise of these vital powers against any First Amendment rights Americans might have to receive communications such as Appellant's. Rather, because the political branches have broad authority to target and suppress enemy communications in wartime, the foreign communications of an alien enemy abroad is simply not protected by the First Amendment.[9]

B. EVEN IF THE FIRST AMENDMENT APPLIES, ACTS AND STATEMENTS THAT INSTRUCT, SOLICIT OR PERSUADE OTHERS TO COMMIT CRIMES ARE NOT PROTECTED.

Citing *Brandenburg v. Ohio*, 395 U.S. 444 (1969), Appellant argues his communications are protected by the Constitution unless they incite imminent lawlessness. Brief for Appellant at 16. "[A]cts and statements that instruct, solicit, or persuade others to commit crimes of

[9] Further, as the Court observed in *Eisentrager*, if the Framers intended, or the Founding generation understood, the First Amendment to restrict the Government's actions in waging foreign war, "such extraterritorial application of organic law would have been so significant an innovation in the practice of governments that . . . it could scarcely have failed to excite contemporary comment. Not one word can be cited." *Eisentrager*, 339 U.S. at 784.

violence," however, are not protected by the First Amendment. *United States v. Rahman*, 189 F.3d 88, 117 (2d Cir. 1999); *United States v. Sattar*, 272 F.Supp.2d 348, 374 (S.D.N.Y. 2003). As Justice Douglas recognized in his concurring opinion in *Brandenburg*, where speech is "brigaded with action" and "prosecution can be launched for the overt acts actually caused," the First Amendment does not immunize the speech from prosecution. *Brandenburg*, 395 U.S. at 456 (Douglas, J., concurring). *See also Brown v. Hartlage*, 456 U.S. 45, 55 (1982)("[W]hile a solicitation to enter into an [criminal] agreement arguably crosses the sometimes hazy line distinguishing conduct from pure speech, such a solicitation . . . may properly be prohibited."); *Cox v. Louisiana*, 379 U.S. 559, 563-64 (1965)("[A] man may be punished for encouraging the commission of a crime."); *Dennis v. United States*, 341 U.S. 494, 581 (1951)(Douglas, J., dissenting)("[T]he freedom to speak is not absolute; the teaching of methods of terrorism . . . should be beyond the pale."); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949); *United States v. Barnett*, 667 F.2d 835, 842 (9th Cir. 1982); *United States v. Varini*, 435 F.2d 758, 762 (6th Cir. 1970) ("[S]peech is not protected by the First Amendment when it is the very vehicle for the crime itself.").

Applying this rationale, several courts approved treason convictions of U.S. expatriates who had broadcast propaganda for the German and Japanese military forces during World War II, despite their claims to First Amendment protection. *E.g., Chandler v. United States*, 171 F.2d 921, 938 (1st Cir. 1949)(one may give aid and comfort to the enemy through communication just as one may commit treason by the communication of intelligence); *Gillars v. United States*, 182 F.2d 962, 971 (D.C. Cir. 1950)("[W]ords which reasonably viewed constitute acts in furtherance

of a program of an enemy to which the speaker adheres and to which he gives aid with intent to betray his own country, are not rid of criminal character merely because they are words.").

More recently, tax protesters have been convicted for counseling others not to pay income tax, and have argued, to no avail, that their "speech" was protected. In one such case, the Ninth Circuit explained, "The First Amendment is quite irrelevant if the intent of the actor and the objective meaning of the words are so close in time and purpose to a substantive evil as to become part of the ultimate crime itself." *United States v. Freeman*, 761 F.2d 549, 552 (9th Cir. 1982). Similarly, in *Rice v. Paladin Enterprises*, 128 F.3d 233, 245 (4th Cir. 1997), a civil case involving dissemination of an instructional guide on how to conduct a murder for-hire, the Fourth Circuit held "speech" does not enjoy First Amendment protection where the accused has the specific purpose of assisting and encouraging the commission of criminal conduct, and the assistance and encouragement takes a form other than abstract advocacy.

Additionally, an important government purpose unrelated to regulating speech may justify incidental limits on First Amendment freedoms. *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968). A four-part test determines if a statute is sufficiently justified: (1) Is the statute within the constitutional power of the Government? (2) Does it further an important or substantial Government interest? (3) Is the Government's interest unrelated to the suppression of free expression? and (4) Is the incidental restraint on speech no greater than essential to further the Government's interest? *Id.* at 377. *See also Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1135 (9th Cir. 2000), *reh'g granted*, 382 F.3d 1154 (2004), *aff'd (in pertinent part) on*

reh'g, 393 F.3d 902 (2004)(en banc)(applying *O'Brien* criteria to federal material support statute).

In the MCA, Congress prohibited people from soliciting, enticing or inducing others to commit terrorist acts. There can be no doubt Congress has constitutional power to prohibit the solicitation of terrorists acts. Further, the Government's interest in preventing such conduct is substantial, and clearly unrelated to any effort to suppress free expression. Finally, the statute is narrowly drawn, so that any incidental restraint on speech is no greater than essential to furthering the Government's interest in preventing terrorism. For example, the law requires an accused "intended the offense [solicited] actually be committed." MMC, Part V, ¶ 5.b. Under the *O'Brien* test, Appellant's conviction for criminal solicitation is lawful.

C. EVEN IF THE *BRANDENBURG* TEST APPLIES, APPELLANT'S CONDUCT SATISFIES THAT TEST.

Under *Brandenburg*, speech is unprotected if it "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg*, 395 U.S. at 447. Appellant's communications clearly qualify as such "advocacy of action."[10] He admitted he was an officer of al Qaeda, R. 492, and agreed with its commitment to "jihad," which he understood to involve killing Americans, including civilians. R. 511-12. He admitted creating the COLE video "to get recruits, new recruits for al Qaeda," R. 514, that the video's "central purpose" was "to build on the USS COLE attack for recruitment purposes and propaganda purposes," and that it had been "influential" and "produced good results." R. 534.

[10] The Government urges the Court to watch the COLE video, Prosecution Exhibit (PE) 31, and read the testimony of Ali Soufan, R. 485-72, Yahya Goba, R. 601-41, Yassein Taher, R. 657-73, Sahim Alwan, R. 683-716, and Evan Kohlmann, R. 750-813.

After highly emotive scenes of Muslims suffering, R. 538-43, attributed to Western infidels and complicit Middle Eastern regimes, R. 545-47, the video asserts violent jihad is the solution. R. 550. It calls on viewers to come to Afghanistan to train for, and actively participate in, violent jihad against the United States. R. 571-72. In the video, Usama bin Laden says, "We encourage the youths to . . . **act upon** his [Mohammad's] teachings and **head to the lands** that prepare them for the path of Jihad . . . **[T]his is your day** to trace the steps of Mohammad (peace be upon Him) and **come out** in the heat and cold to defend No God But One God." Prosecution Exhibit ("PE") 31 transcript at 13 (emphasis added). Later, he says, "Strive hard **and fight** in the cause of God with your wealth and lives." *Id*. at 19 (emphasis added).

Mr. Evan Kohlmann, an al Qaeda expert, testified that the purpose of the video was to "take people through a narration, through a story line where they begin as perhaps neutral observers; and by the end, they are no longer neutral. **They are motivated into action**." R. 811-12 (emphasis added). He explained the video was widely distributed outside Afghanistan, with the intent to produce even more recruits for violent jihad, and had demonstrated power to incite Western Muslims with no prior contact with al Qaeda to act. R. 813. He testified the video had an "absolutely incredible impact," pointing to the role it played in motivating people like those convicted of conspiring to attack Ft. Dix, and those who attempted to set up a terrorist training camp in North America. R. 810.

Moreover, the video was shown to potential recruits and to trainees in Afghanistan, as part of a regular indoctrination routine. R. 617-20, 665-68, 690-98. One witness, who saw the video at both a guesthouse in Kandahar, Afghanistan, and a nearby al Qaeda training camp,

testified that, when he saw the video, he realized, "this was real. This wasn't like just talk about it. These were real. They were serious about it. They advocated it." R. 691. He added that the COLE video called on viewers:

> **to train for jihad and target al Qaeda's enemy** . . . . It condoned killings – from what I took for it, it condoned killing of civilians, destruction of infrastructure, condoning suicide bombings and suicide missions. In my opinion, it -- it -- **it was actually a tool** . . . it's a way of **jolting your enthusiasm**, you know, waking you, you know, like what we would say, you know, "Wake up." You need to wake up and realize that is happening **and take care of it** as a Muslim and it's obligated on you to do it."

R. 715-16 (emphasis added). He added the video was "a recruiting method." R. 716.

On this record, it is clear Appellant's conduct went beyond "mere advocacy," and sought to indoctrinate a group in preparation for future violent action by advocacy directed to action for the accomplishment of violent jihad. *See Yates v. United States*, 354 U.S. 298, 321-22 (1957). His actions prepared his viewers for violent action and steeled them to such action. *See Brandenburg*, 395 U.S. at 448. Appellant's admitted intent was to incite viewers to undergo terrorist training and then use that training to commit acts of terrorism, and the very technique he used – whipping his audience into an emotional frenzy through evocative and inflammatory photographs and appeals to religious duty – was calculated to produce a visceral and immediate response to the call to jihad, i.e., to incite imminent lawless conduct. Appellant's conduct is not protected under *Brandenburg*, and his conviction of Solicitation should be affirmed.

III. THE MILITARY COMMISSION VALIDLY EXERCISED JURISDICTION OVER ALL THE CHARGES.

A. CONSTITUTIONAL POWER TO ESTABLISH THE JURISDICTION OF MILITARY COMMISSIONS BELONGS TO THE POLITICAL BRANCHES EXERCISING THEIR WAR POWERS.

As the Supreme Court has explained, offenses committed by enemy belligerents against the law of war "has never been deemed to be within" the terms of Article III, § 2 of the Constitution, which defines the scope of the judicial power. *Ex Parte Quirin*, 317 U.S. 1, 41 (1942). As a result, trial of such offenses is not subject to the requirements of Article III, and may, for example, be conducted without indictment or jury. *Id*.

Rather, the treatment of captured enemy combatants during war is a matter committed to the political branches under their enumerated wars powers. U.S. Const. art. I, § 8, cl. 1 ("to provide for the common Defence,"); art. I, § 8, cl. 12, 13 ("to raise and support Armies and to provide and maintain a Navy"); art. I, § 8, cl. 14 ("to make Rules for the Government and Regulation of the land and naval Forces"); art. I, § 8, cl. 11 ("to declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water"); art. I, § 8, cl. 10 ("to define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations"); art. II, § 2 (President "shall be commander in chief of the Army and Navy"). As Colonel Winthrop, the "Blackstone of Military Law,"[11] explained:

> [I]n general, it is those provisions of the Constitution which empower Congress to "declare war" and "raise armies," and which, in authorizing the initiation of *war* authorize the employment of all necessary and proper agencies for its due prosecution, from which this tribunal derives its original sanction. Its authority is thus the same as the authority for the making and waging of war and for the exercise of military government and martial law. **The commission is simply an instrumentality for the more efficient execution of the war powers vested in**

[11] *Hamdan v. Rumsfeld*, 548 U.S. 557, 597 (2006) (plurality op.)(referring to *Military Law and Precedents* as "[t]he classic treatise penned by Colonel William Winthrop, whom we have called the 'Blackstone of Military Law,'"(quoting *Reid v. Covert*, 354 U.S. 1, 19, n. 38, (1957) (plurality opinion))).

Congress and the power vested in the President as commander-in-chief in war.

W. Winthrop, *Military Law and Precedents* 831 (2d ed. 1920)(italics in original)(emphasis added). Consequently, the lawful scope of a military commission's jurisdiction is a matter to be determined by Congress.[12]

For the first time in American history, Congress and the President, in the exercise of their constitutional war powers, have enacted a comprehensive code governing military commissions – the MCA.[13] That code establishes the subject matter jurisdiction of military commissions, and explicitly extends jurisdiction to the offenses codified in the MCA. So long as the political branches' were justified in the exercise of their war powers, and the accused is a person properly subject to those powers, Congress and the President were within their authority to determine the jurisdiction of military commissions under the MCA. Because the offenses with which Appellant were charged are offenses over which the MCA confers jurisdiction, Appellant's military commission properly exercised subject matter jurisdiction.

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[12] Col. Winthrop's discussion of the jurisdictional limits of military commissions can suggest, at first glance, that commissions are limited to common law of war offenses. Upon closer inspection, however, it is clear Col. Winthrop was simply addressing the situation that obtains in the absence of enabling legislation. Referring to the membership of a commission, for example, he says, "**In the absence of any statute** prescribing by whom military commissions shall be constituted . . . ." Winthrop at 835. Likewise, discussing jurisdictional limits on venue, he says, "A military commission, (**except where otherwise authorized by statute**), can legally assume jurisdiction only of . . ." and "The place must be the theatre of war or a place where military government or martial law may legally be exercised; otherwise a military commission, (**unless specifically empowered by statute**) will have no jurisdiction of offenses committed therein." *Id*. at 836 (emphasis added).

[13] On 28 October 2009, President Obama signed into law the Military Commissions Act of 2009. *See* http://www.whitehouse.gov/the-press-office/remarks-president-signing-national-defense-authorization-act-fiscal-year-2010. With the enactment of the MCA of 2009, two different Presidents and two different Congresses have spoken on the issue of how military commissions should be conducted.

B. EVEN IF A MILITARY COMMISSION'S JURISDICTION IS LIMITED TO COMMON LAW OF WAR OFFENSES, THE OFFENSES OF WHICH APPELLANT STANDS CONVICTED VIOLATE THE LAW OF WAR.

(1) TERRORISM IS A WAR CRIME.

Appellant stands convicted, in short, of conspiring to commit, soliciting others to commit, and materially supporting terrorism. Terrorism, though perhaps often by other names, is undoubtedly a war crime. As the authoritative commentary on the Geneva Conventions says, it is a "cardinal principle of the law of war . . . that the civilian population must enjoy complete immunity." 4 International Committee of Red Cross, *Commentary: Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 3 (J. Pictet, ed. 1958). Thus, terrorist attacks – carried out in complete contempt for that "cardinal principle" – violate the law of war.[14]

Article 3 Common to the Geneva Conventions of 1949 ("Common Article 3"), Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, is of particular relevance given the Supreme Court has held our conflict with al Qaeda is governed by it. *Hamdan v. Rumsfeld,* 548 U.S. 557, 629 (2006). Common Article 3 requires all parties to a non-international armed conflict to treat persons taking no active part in the hostilities humanely, and prohibits, *inter alia*, with respect to such persons, violence to life

[14] Murdering or attacking innocent civilians in an armed conflict constitutes a "grave breach" of: (1) Article 147 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War ("Fourth Geneva Convention"), Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, by killing "protected persons;" (2) Article 23 of the Hague Regulations Respecting the Laws and Customs of War on Land ("Hague Regulations"), annexed to Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, by inflicting unnecessary death and suffering on the target population; and (3) Article 3 Common to the Geneva Conventions of 1949 ("Common Article 3"), Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, by purposely killing non-combatants. Likewise, Article 33 of the Fourth Geneva Convention expressly prohibits "all measures . . . of terrorism."

and person. In 1997, Congress expressly made any violation of Common Article 3 a war crime under the War Crimes Act. Foreign Operations, Export Financing and Related Programs Appropriation Act, 1998, Pub. L. No. 105-118, § 583, 111 Stat. 2436 (1997). Further, every federal court to consider the issue has concluded Common Article 3 violations are "serious violations of international law" and "war crimes." *E.g. Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995); *Linder v. Portocarrero*, 963 F.2d 332 (11th Cir. 1992); *Doe v. Islamic Salvation Front*, 993 F.Supp.3d (D.D.C. 1998).

Additionally, although not binding on the United States, several international law authorities demonstrate the global consensus that violations of Common Article 3 are war crimes. For example, the Rome Statute of the International Criminal Court, *opened for signature* Jul. 17, 1998, 2187 U.N.T.S. 3, specifically criminalizes violations of Common Article 3. *Id*. at Art. 8. Likewise, the statute authorizing the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 2004), imposes criminal liability for serious violations of Common Article 3, including for "acts of terrorism." *Id*. at Art. 4. The statute authorizing the International Criminal Tribunal for the former Yugoslavia ("ICTY"), S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993), does not explicitly include violations of Common Article 3 as war crimes, but the Tribunal has held the provision concerning "other serious violations of the laws and customs of war" necessarily includes violations of Common Article 3. *E.g.*, *Prosecutor v. Tadic*, No. IT-94-1-AR72, ¶¶ 87-91 (ICTY Appeals Chamber 1995), *reprinted in* 35 I.L.M. 32 (1996). In fact, ICTY convicted a defendant for "unlawfully inflicting terror upon civilians." *Prosecutor v. Galic*, No. IT-98-29-T, ¶ 12 (ICTY Trial Chamber 2003). Finally, the criminal law and military manuals of many states recognize violations of Common Article 3 as war

crimes. *See, e.g.*, Tom Graditzky, *Individual Criminal Responsibility for Violations of International Humanitarian Law in Non-International Armed Conflicts*, 322 Int'l Rev. Red Cross 29 (1998) (collecting sources).

Moreover, to apprehend and prosecute international terrorists, the United States relies upon no fewer than twelve antiterrorism treaties, some of which expressly condemn terrorist bombings (in general) and plane bombings (in particular), in addition to the killing of innocent civilians. *See* International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, 39 I.L.M. 270; International Convention for the Suppression of Terrorist Bombings, Dec. 15, 1997, 37 I.L.M. 249; Convention on the Marking of Plastic Explosives for the Purpose of Detection, Mar. 1, 1991, 30 I.L.M. 726; Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, Mar. 10, 1988, 1678 U.N.T.S. 304; Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 1678 U.N.T.S. 221; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Feb. 24, 1988, 27 I.L.M. 627; Convention on the Physical Protection of Nuclear Material, Oct. 24, 1979, 18 I.L.M. 1419, 1456 U.N.T.S. 1987; International Convention Against the Taking of Hostages, G.A. Res. 34/146, U.N. Doc A/34/46 (17 Dec. 1979), 1316 U.N.T.S. 205; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167; Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 565, 974 U.N.T.S. 177; Hague Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22

U.S.T. 1641, 860 U.N.T.S. 105; Tokyo Convention on Offenses and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219.

In addition, the United Nations Security Council has repeatedly denounced Usama bin Laden and his associates as terrorists, and emphatically condemned al Qaeda's actions as war crimes. *E.g.*, S.C. Res. 1189, U.N. Doc. S/RES/1189 (Aug. 13,. 1998) (al Qaeda's attacks on U.S. embassies in Kenya and Tanzania). In 1999, the Security Council established the "Al-Qaida and Taliban Sanctions Committee," again condemning Usama bin Laden's actions. S.C. Res. 1267, U.N. Doc. S/RES/1267 (Oct. 15, 1999); *see also* S.C. Res. 1333, U.N. Doc. S/RES/1333 (Dec. 19, 2000); S.C. Res. 1390, U.N. Doc. S/RES/1390 (Jan. 16, 2002); S.C. Res. 1455, U.N. Doc. S/RES/1455 (Jan. 17, 2003); S.C. Res. 1526, U.N. Doc. S/RES/1526 (Jan. 30, 2004); S.C. Res. 1617, U.N. Doc. S/RES/1617 (Jul. 29, 2005); S.C. Res. 1735, U.N. Doc. S/RES/1735 (Dec. 22, 2006). In the wake of the attacks of September 11, 2001, the Security Council reaffirmed its condemnation of international terrorism as a crime and a threat to international security. S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001). Furthermore, it called on all member states to criminalize the material support for terrorism. *Id*. §§ 1-2, 4-5.

Even beyond the formal principles codified in international treaties, conventions and Security Council resolutions, terrorism has long violated the common law of war. The year before he published what would become a cornerstone in the law of war,[15] Dr. Francis Lieber emphasized that "guerillas," and those who associate themselves with guerillas, were subject to

[15] Lieber's *Instructions for the Government of the Armies of the United States in the Field* (1863), also known as *Lieber's Code*, became a cornerstone in the law of war when it was issued by President Lincoln as General Orders No. 100 during the Civil War. *See also* G.I.A.D. Draper, *The Status of Combatants and the Question of Guerilla Warfare*, 45 Brit. Y.B. Int'l L. 173, 179 (1971) ("[T]he writings of Lieber were the first major attempt to give written form to the customary rules of land warfare prevailing at the end of the first half of the nineteenth century.").

summary execution under the law of war. In a description that applies with equal force to modern-day terrorists, Dr. Lieber emphasized:

> [A] guerilla party means an irregular band of armed men, carrying on an irregular war, not being able, according to their character as a guerilla party, to carry on what the law terms a *regular* war. The irregularity of the guerilla party consists in its origin, for it is either self-constituted or constituted by the call of a single individual, . . . and it is irregular as to the permanency of the band, which may be dismissed and called again together at any time.

Francis Lieber, *Guerilla Parties Considered with Reference to the Laws and Usages of War* 7-8 (1862). Lieber went on to explain that the term "guerilla" is often connected to "the idea of intentional destruction for the sake of destruction," "the ideas of general and heinous criminality, . . . because the organization of the party being but slight and the leader utterly dependent upon the band, little discipline can be enforced," and the idea of a "spy . . . because he that to-day passes you in the garb and mien of a peaceful citizen, may to-morrow, as a guerilla man, fire your house or murder you from behind the hedge." *Id.* at 8-9. Lieber also emphasized that the definition of "guerilla" was "particularly confused" under the law of war. *Id*. at 1. Notwithstanding the lack of clear definition, the punishment of "guerillas" was not precluded. To the contrary, during the Peninsular War (1808-1814), many guerillas "were shot when made prisoners." *Id.* at 7. Thus, Lieber concluded,

> "[g]uerilla parties . . . do not enjoy the full benefit of the law of war. . . . The reasons for this are, that they are annoying and insidious, that they put on and off with ease the character of a soldier, and that they are prone, themselves, to treat their enemies who fall into their hands with great severity.

Id. at 18 (internal quotation marks omitted).[16]

[16] Like Lieber's *Guerilla Parties, Lieber's Code* emphasized that those who dress as civilians and yet commit hostilities were subject to summary execution. *See Lieber's Code* at ¶ 82 ("Men, or squads of men, who commit hostilities, whether by fighting, or inroads for destruction or plunder, or by raids of any kind, without commission, without being part and portion of the organized hostile army, and without sharing continuously in the war, but who do so with intermitting returns to their homes and avocations, or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character or appearance of soldiers—such men, or squads of men, are

At the conclusion of World War I, the Allies identified "systematic terrorism" as a violation of the laws and customs of war. Commission of Responsibilities, Conference of Paris, 1919, *Violation of the Laws and Customs of War* (Clarendon Press: London, 1919) 17. Likewise, following World War II, the Allies punished "systematic terror" as a war crime. *E.g.* Ordonnance du 28 Août 1944 Relative à la Répression des Crimes de Guerre (France), Art. 2(2), *translated and reprinted in* 3 L. Rep. Trials of War Criminals 95 (1947); Regulations under the Commonwealth of Australia War Crimes Act, 1945 (Statutory Rules, 1945, No. 164, and 1946, No. 30), *reprinted in* 5 L. Rep. Trials of War Criminals 94-95 (1947); Netherlands East Indies Statute Book Decree No. 44 of 1946, Art. I, *reprinted in* 11 L. Rep. Trials of War Criminals 93 (1947); Law Governing the Trial of War Criminals of Oct. 24, 1946 (Rep. of China), Art. II, ¶2, *reprinted in* 14 L. Rep. Trials of War Criminals 153 (1947).

Modern-day terrorists, including those that fight for al Qaeda, are like the guerillas that Lieber, Winthrop, and others emphatically condemned. As one scholar explained:

> More recently guerilla activities have been conducted as a method of securing specific political objectives by groups or organizations disassociated from States or other belligerents, and directed at particular governments, their nationals and property, where and whenever opportunity presents itself. Thus we have arrived at a time when guerilla warfare, in the sense of sporadic and clandestine actions of armed violence for specific political purposes by loosely organized groups in varying degrees of association with, or disassociation from, any government, is a feature of our age. Its manifestations are very diverse and often effective. The capacity of these groups, however small, to inflict substantial damage upon military formations during an armed conflict, and upon the civilian population in times of relative normality, is not disputable.

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not public enemies, and therefore, if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates.").

G.I.A.D. Draper, *The Status of Combatants and the Question of Guerilla Warfare*, 45 Brit. Y.B. Int'l L. 173, 183 (1971); *see also Trial of Shigeki Motomura and 15 Others*, 13 L. Rep. Trials of War Criminals 138 (1947) (describing violations of "the laws and customs of war," including "systematic terrorism"). Although the above passage was written almost two decades before al Qaeda's formation, it well-describes that organization's guerilla-like tactics. Like its guerilla-party forebears, al Qaeda's existence and operation constitute terrorism in violation of the law of war. Thus, under any reasonable interpretation of the law of war, terrorism is a war crime. *See* Ingrid Detter, *The Law of War* 21-25 (2d ed. 2000); Christopher Greenwood, *War, Terrorism, and International Law*, 56 Current L. Probs. 505, 515 (2003); Derek Jinks, *September 11th and the Laws of War*, 28 Yale J. Int'l L. 1, 2 (2003).

(2) SIMILARLY, PROVIDING MATERIAL SUPPORT FOR TERRORISM HAS LONG VIOLATED THE LAW OF WAR.

Just as terrorism is a well-established war crime, so too is providing material support therefor. Long before Appellant began supporting al Qaeda, providing material support for terrorism violated both U.S. and international law.

The law of war has long prohibited the provision of material support to groups of unlawful combatants. Since at least the Civil War, the United States has considered it a war crime to materially support groups of unlawful combatants by providing them one's personal services. So, in 1865, the Attorney General opined that "to unite with banditti, jayhawkers, guerillas, or any other unauthorized marauders is a high offence against the laws of war; **the offence is complete when the band is** organized or **joined**." 11 Op. Att'y Gen. 297, 312 (emphasis added). Likewise, numerous people were tried by military commission for joining or

being a guerilla. *E.g.*, War Dep't., General Court-Martial Orders ("G.C.M.O."), No. 51 (1866)(military commission trial of James Harvey Wells for "[b]eing a guerrilla"); Hdqrs. Dep't. of Kentucky, G.C.M.O., No. 108, p. 1 (1865)(military commission trial of Henry C. Magruder for "[b]eing a guerrilla"); Hdqrs. District of the Border, Special Orders, No. 39 (1863)(military commission trial of John West Wilson for violating the laws of war by "join[ing] and co-operat[ing] with an armed band of insurgents and guerrillas who were engaged in plundering the property of peaceable citizens . . . ."); War Dep't, G.C.M.O., No. 93 (1864)(military commission trial of James A. Powell on charges he "joined and consorted with . . . a leader of a band of insurgents and armed rebels . . . ."); Hdqrs. Dep't of the Mississippi, General Orders, No. 9 (1862)(military commission trials of Stephen Bontwell and John W. Montgomery for being "a member of a marauding band," and "belong[ing] to a marauding or guerrilla band.").

During the Civil War, "numerous rebels . . . furnish[ed] the enemy with arms, provisions, clothing, horses and means of transportation; [such] insurgents [we]re banding together in several of the interior counties for the purpose of assisting the enemy to rob, to maraud and to lay waste to the country. All such persons are by the laws of war in every civilized country liable to capital punishment." H.R. Doc. No. 65, 55th Cong., 3d Sess., 234 (1894). Likewise, in describing violations of the "laws and usages of war cognizable by military tribunals," Colonel Winthrop includes:

> running a blockade, unauthorized contracting, trading or dealing with enemies, furnishing them with money, arms, provision, medicines, etc., conveying to or from them dispatches, letters or other communications, . . . aiding the enemy by harboring his spies, emissaries, etc. . . . acting as a guide to his troops . . . secretly recruiting for his army, negotiating and circulating his currency or securities . . . publications or declarations calculated to excite opposition to the federal government or sympathy with the enemy . . . .

Winthrop at 841. Accordingly, Union forces tried those caught materially supporting the rebel forces. *E.g.* Hdqrs. Dep't of the Mississippi, General Orders, No. 9 (1862)(military commission trial of Isaac T. Jones for buying cattle for the Southern army and William Lisk for furnishing another a gun for use in firinig on U.S. troops); Hdqrs. Dep't of the Missouri, General Orders, No. 42 (1862)(military commission trial of Isaac H. Breckinridge for violating law of war by sending clothing to his son, a Confederate soldier).

Following World War II, the Allies prosecuted German industrialists who had rendered material support to Nazi war crimes. A British military court sentenced two men to death for knowingly supplying the poison gas used for exterminating allied nationals interned in concentration camps. *Zyklon B Case*, 1 L. Rep. Trials of War Criminals 93 (1947). Similarly, a U.S. military tribunal convicted German industrialists of war crimes for, in part, knowingly supporting the *Schutzstaffel* ("SS"), a criminal organization, by their influence and money. *Flick Trial*, 9 L. Rep. Trials of War Criminals 29 (1947).

Although the words "material support for terrorism" were not used, it has historically violated the law of war to provide oneself, or any other material support, to an outlaw organization, such as al Qaeda, whose principal purpose is the "killing [and] disabling . . . of peaceable citizens or soldiers." Winthrop at 784. Thus, providing material support for terrorism is, and was prior to the enactment of the MCA, a violation of the law of war. The MCA's codification of that prohibition does not violate the prohibition against ex post facto laws.

(3) LIKEWISE, BOTH CONSPIRACY AND SOLICITATION TO COMMIT TERRORISM ARE VIOLATIONS OF THE LAW OF WAR.

Winthrop reports that, during the Mexican-American War, military commissions tried defendants for "attempting to entice soldiers to desert the U.S. service." Winthrop at 833. Likewise, Winthrop included the following among his description of war crimes: "recruiting for [the enemy] army," and distributing "publications or declarations calculated to excite opposition to the federal government or sympathy with the enemy." *Id*. at 841. While he did not use the word "solicitation," such conduct was the gravamen of these offenses.

Likewise, conspiracy has historically violated the law of war. In 1865, in perhaps the most famous example of trial by military commission, a military commission tried eleven people on a charge that they did "combine, confederate, and **conspire . . .** to kill and murder . . . Abraham Lincoln . . . ." Benn Pitman, ed. *The Assassination of President Lincoln and the Trial of the Conspirators* (Moore, Wilstach & Baldwin: Cincinnati, 1865) 18. The Attorney General had previously opined that the trial by military commission of the Lincoln conspirators was lawful. 11 Op. Att'y Gen. 297 ("Having given the question propounded the patient and earnest consideration its magnitude and importance require . . . I am of the opinion that the conspirators not only may but ought to be tried by a military tribunal."). Winthrop, too, supports the conclusion conspiracy is an offense under the law of war. Describing the form of charging at military commissions, he explains that "[w]here the offense is **both** a crime against society **and a violation of the laws of war**, the charge, in its form, has not unfrequently represented **both** elements, as 'Murder, in violation of the laws of war,' 'Conspiracy, in violation,' etc." Winthrop at 842.[17]

[17] Winthrop had earlier explained that, during the Civil War, military commissions often exercised jurisdiction over both violations of the law of war and, in situations of martial law or occupation, civil crimes. Hence, he provides guidance on how one might charge an offense before a commission exercising multiple grounds for jurisdiction.

Appellant cites Winthrop for the proposition that inchoate crimes such as conspiracy cannot be war crimes. Winthrop actually says, "[T]he jurisdiction of the military commission should be restricted to cases of offence consisting in *overt acts*, i.e. in unlawful commissions or actual attempts to commit, and not in intentions merely. Winthrop at 841 (italics in original) (footnote omitted). Winthrop does not say this principle prohibits conspiracy charges. In fact, he refers to conspiracy as a law of war offense on the very next page. Further, as defined in the MCA, conspiracy does not punish "intentions merely," but rather requires proof of overt acts in furtherance of the conspiracy, as proven in this case.

While the International Military Tribunal at Nuremberg declined to entertain charges of conspiracy to commit war crimes, because such a crime was not specified in the London Charter, *see United States v. Göring*, 1 Trial of the Major War Criminals 226 (1947), various national military tribunals did hold Nazis responsible for conspiracy-like war crimes. 15 L. Rep. Trials of War Criminals 90-91 (1947). For example, the French convicted various persons for engaging in an *association de malfaiteurs*, or criminal association.[18] *Id*. (citing French military tribunals). Similarly, both Dutch municipal war crimes law and the Netherlands East Indies war crimes decree made conspiracy to commit a war crime equally punishable with the substantive war crime. 11 L. Rep. Trials of War Criminals 97-98 (1947).

Winthrop's guidance, however, only makes sense if understood to say conspiracy is an offense under the law of war, as well as under the civil law.

[18] Article 265 of the French *Code Pénal* provided: "Any association formed, whatever its duration or the number of its members, and any undertaking arrived at for the purpose of preparing or committing crimes against persons or against property, constitutes a crime against the public peace." 15 L. Rep. Trials of War Criminals 90 (1947). This offense was recognized as a war crime by the Ordinance of Aug. 28, 1944.

Finally, the post-World War II tribunals clearly treated the ordering and persuading of another to commit a war crime as itself a war crime. *E.g.*.12 L. Rep. Trials of War Criminals 118 (1947)(commander who knowingly and willfully gives unlawful order guilty of criminal act *per se*, regardless whether order is executed); 6 L. Rep. Trials of War Criminals 62 (person who persuades another to commit murder guilty of crime); Ordonnance du 28 Août 1944 (France), *supra* (illegal recruitment for enemy force is war crime).

C. BECAUSE CONGRESS HAS THE CONSTITUTIONAL POWER TO DEFINE AND PUNISH OFFENSES AGAINST THE LAW OF NATIONS, ITS CONCLUSION THAT THE OFFENSES CODIFIED IN THE MCA VIOLATE THE LAW OF WAR IS ENTITLED TO GREAT DEFERENCE.

The Constitution gives to Congress the "power to define and punish . . . offenses against the law of nations." U.S. Const. art. I, § 8, cl. 10. Exercising that authority in the MCA, Congress defined and codified conspiracy, solicitation, and material support for terrorism as crimes punishable by military commission. When Congress exercises its explicit textual power to "define and punish," especially in the context of armed conflict where national security is at stake, its judgment is entitled to the greatest deference. *United States v. Morrison*, 529 U.S. 598, 607 (2000); *United States v. Clark*, 435 F.3d 1100, 1109 (9th Cir. 2006). As demonstrated above, there is ample evidence on which Congress could reasonably have concluded each of these offenses violates the law of war.

IV. CHARGE III (MATERIAL SUPPORT FOR TERRORISM) DOES NOT VIOLATE THE EX POST FACTO PROHIBITION AND WAS NOT ERRONEOUSLY DEFINED BY THE MILITARY JUDGE.

A. THE CONDUCT PROHIBITED BY THE MCA HAS LONG VIOLATED THE LAW OF WAR AND ITS CODIFICATION IN THE MCA DOES NOT VIOLATE THE EX POST FACTO PROHIBITION.

The Supreme Court has emphasized that the Ex Post Facto Clause is implicated only where (1) Congress "retroactively alter[s] the definition of crimes or increase[s] the punishment for criminal acts," *Collins v. Youngblood*, 497 U.S. 37, 43 (1990), or (2) the statute "disadvantage[s] the offender affected by [it]." *Id.* at 41. Neither condition is met here. As explained above, providing material support to groups of unlawful combatants has been a war crime since at least the Civil War. And under the law of war, unlawful combatants, such as Appellant, faced military commissions (at best) or summary execution (at worst) for openly flaunting the rules and customs that governed armed conflict. Thus, the MCA does not "retroactively alter the definition of" or "increase the punishment for" material support of terrorism within the meaning of the Ex Post Facto Clause.

To be sure, the MCA expressly applies to conduct that occurred prior to its enactment. 10 U.S.C. § 950p(b). Simply regulating past conduct, however, under the same substantive standards that previously applied, does not violate the Ex Post Facto Clause. Thus, it is well established that changes to judicial tribunals and provisions governing venue or jurisdiction do not violate the ex post facto prohibition. Courts have long held that the clause does not apply to the abolition of old courts and the creation of new ones, *Duncan v. State*, 152 U.S. 377 (1894), the creation or alteration of appellate jurisdiction, *Mallett v. North Carolina*, 181 U.S. 589 (1901), the transfer of jurisdiction from one court or tribunal to another, *People ex rel. Foote v. Clark*, 119 N.E. 329 (Ill. 1918), or the modification of a trial panel, *Commonwealth v. Phelps*, 96 N.E. 349 (Mass. 1911). Indeed, the Supreme Court has "upheld intervening procedural changes [under the Ex Post Facto Clause] **even if application of the new rule operated to a defendant's disadvantage in the particular case.**" *Landgraf v. USI Film Prod.*, 511 U.S. 244, 275 n.28

(1994)(emphasis added). The rationale for these decisions is clear: The Ex Post Facto Clause applies only to laws that retroactively alter the definition or consequences of a criminal offense – not to *jurisdictional* or *procedural* provisions that affect where or how criminal liability is adjudicated.

In addition, Appellant cannot reasonably claim he has been "disadvantaged" by the MCA's enactment. Banditti, jayhawkers, and guerillas were historically liable to be shot immediately upon capture. Where such individuals have instead been tried, the United States has prosecuted them based on the common law of war. Indeed, the MCA represents one of the first attempts by the United States to set out clearly, in its domestic law, the law of war offenses triable by military commissions. The fact Congress chose to codify these law of war offenses does not amount to the creation of "new" offenses. To the contrary, Appellant is better off, based on the clarity provided by Congress and the extensive array of procedural protections provided by the MCA, the likes of which no unlawful combatant has ever enjoyed in the history of warfare.

B. THE MILITARY JUDGE DID NOT ERR IN DEFINING "MATERIAL SUPPORT AND RESOURCES."

MCA § 950v(b)(25) incorporates by reference the definition of "material support and resources" found in 18 U.S.C. § 2339A. As Appellant notes, in providing that definition to the members, the military judge inserted "propaganda" and "recruiting materials," in the list of items and actions constituting material support and resources. R. 858. Appellant alleges this was plain error. Brief for Appellant at 30. He is mistaken.

The very first words of the definition are, "material support and resources means ***any*** property, tangible or intangible, or service, including . . . ." 18 U.S.C. § 2339A(b)(emphasis added). The remainder of the definition merely provides examples. Appellant, therefore, may be convicted of providing material support for terrorism if he provides **any** property or service under the circumstances prohibited by the law. While propaganda and recruiting materials are not explicitly listed in 10 U.S.C. § 2339A(b), they certainly qualify as "property . . . or service," the provision of which to an international terrorist organization is prohibited. Because these additional examples neither changed the meaning of the defined term nor expanded the potential grounds for criminal liability, the instruction was not erroneous.

V. THE MILITARY COMMISSIONS ACT OF 2006 IS NOT AN UNCONSTITUTIONAL BILL OF ATTAINDER.

"A bill of attainder is a ***legislative act*** which inflicts punishment without a judicial trial." *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 323 (1866)(emphasis added). *Accord United States v. Lovett*, 328 U.S. 303, 315 (1946). If the MCA constitutes a bill of attainder, and if the Constitution prohibited Congress from enacting it, the constitutional violation occurred when the law was enacted, not when Appellant was convicted.[19] With those considerations in mind, we can now proceed to consider whether the prohibition on bills of attainder applies in this case, and if so, whether it is violated.

A. THE CONSTITUTIONAL PROHIBITION AGAINST BILLS OF ATTAINDER DOES NOT PROTECT APPELLANT, AN ENEMY ALIEN GUILTY OF VIOLATING THE LAW OF WAR.

[19] This is not to say that, if the MCA were a constitutionally prohibited bill of attainder, the Court would not have a duty to strike down the statute as applied to Appellant; rather, it is simply to point out that the proper analytic focus is on the law, rather than Appellant's conviction or his location at Guantánamo Bay.

While the Constitution prohibits Congress from enacting bills of attainder, U.S. Const. art. I, § 9, cl. 3, that prohibition does not limit Congress' explicit power to "define and punish . . . Offences against the Law of Nations." *Id.* at § 8, cl. 10. Just as the Sixth Amendment guarantee of the right to a jury trial does not restrict Congress' ability, pursuant to its power to make rules for the government and regulation of the land and naval forces, to enact a code of military justice that does not provide for such juries, neither does the prohibition on bills of attainder prevent Congress from acting to punish offenses against the Law of Nations.

Historically, captured enemy war criminals were at the mercy of the Sovereign. *See King v. Allen*, [1921] 2 I.R. 241, 270 (Ire.)("In considering any question arising out of the administration of martial law by military courts, we must not lose sight of the fact that they are not, in strictness, Courts at all; but as Mr. Justice Stephen says, 'merely committees formed for the purpose of carrying into execution the discretionary powers assumed by the Government.'"); *Tilonko v. Attorney General of Natal*, [1907] 1 A.C. 93, 94-95 (P.C. 1906)(appeal from court-martial sitting at Pietermaritzburg, Colony of Natal)(same). Even as late as the American Civil War, enemy war criminals were "liable to be shot, imprisoned, or banished, either *summarily where their guilt was clear*, or upon trial and conviction by military commission." Winthrop, at 784.

In this context, then, the Constitution conferred on Congress the explicit power to punish offenses against the Law of Nations. Because the power to punish war crimes is explicitly committed to Congress, it is entirely up to Congress to determine how it shall punish such offenses. As the Supreme Court said in an analogous context,

> The mode of determining matters of this class [i.e., matters arising between the Government and others, which from their nature do not require judicial determinations, since they are matters committed to Congress] is completely within Congressional control. Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals.

Ex Parte Bakelite Corp., 279 U.S. 438, 449 (1929). Indeed, it is because it is within Congress' discretion to define and punish war crimes and provide for the common defense, that Congress may provide for such offenses to be adjudicated in military commissions rather than in Article III courts.

Nevertheless, because Congress may reserve to itself the power to define and punish war crimes, without the use of legislative courts created under Article I, if it so chose, it cannot be the case that the Bill of Attainder Clause operates to prevent Congress, in the exercise of its power under the Define and Punish Clause, from determining that particular conduct by enemy aliens constitutes a violation of the Law of Nations, and punishing that conduct.

B. EVEN IF THE BILL OF ATTAINDER CLAUSE LIMITS CONGRESS' POWER TO PUNISH ENEMY WAR CRIMINALS, THE MCA IS NOT A BILL OF ATTAINDER.

The Bill of Attainder Clause prohibits "legislative acts that inflict punishment without a judicial trial." *Cummings*, 71 U.S. (4 Wall.) at 323. It defies logic to conclude that the creation of a trial process, particularly one that guarantees the presumption of innocence, *see* 10 U.S.C. § 949*l*(c)(1), constitutes infliction of punishment without trial.

In *Lovett, supra*, Congress denied compensation to three Executive Branch employees by name. *Lovett*, 328 U.S. at 314. The "punishment" was the denial of compensation. Because the

penalty was automatic, it was necessarily imposed "without a judicial trial." Consequently, the Court held the law was a bill of attainder. Similarly, in *Cummings*, the Court invalidated a provision of the Missouri constitution that prohibited anyone who failed to take a loyalty oath from serving in various positions. *Cummings*, 71 U.S. (4 Wall.) at 317. Because refusal to take the oath automatically resulted in the disqualifying punishment, the law was a bill of attainder. *Lovett*, 328 U.S. at 327 (Frankfurter, J., concurring).

The MCA does not automatically impose punishment on either named individuals or a designated group. Rather, it provides robust procedures for a trial to determine both an accused's amenability to the commission's personal jurisdiction and his culpability. As previously noted, the law provides for the presumption of innocence, assistance of counsel, discovery, the right to call witnesses, the right to have guilt determined beyond a reasonable doubt by impartial members, the right to appellate review, and many others. This is more process than has ever been guaranteed to enemy combatants in any war ever fought, and cannot seriously be described as "a legislative act which inflicts punishment without a judicial trial." *Cummings*, 71 U.S. (4 Wall.) at 323.

Appellant attempts to avoid this conclusion by arguing that it is not the conviction and sentence of a military commission that constitutes punishment, but rather the trial itself. The Government is aware of no case holding that merely trying a defendant before an Article I judge *itself* constitutes punishment, and nothing in the Bill of Attainder Clause forbids Congress from prescribing the procedures to be used in military commissions. In *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), the Supreme Court rejected the President's attempt to create a system of

military commissions without prior express authorization from Congress. *Id.* at 613. Even among the Justices who voted to strike down the pre-MCA military commissions system, virtually all appeared to agree it would be appropriate for Congress and the President jointly to enact a system of military commissions. *Id.* at 636 (Breyer, J., concurring, joined by Kennedy, Souter and Ginsburg, JJ.) ("Congress has denied the President the legislative authority to create military commissions of the kind at issue here. Nothing prevents the President from returning to Congress to seek the authority he believes necessary."). Congress and the President have now done precisely that.

Appellant argues the MCA violates the Bill of Attainder Clause by "depriving" him of (1) rights under the Geneva Conventions; (2) the right against self-incrimination, and (3) the right to fully confront the evidence against him. Brief for Appellant at 32.[20] Each of these claims is easily refuted. First, the Geneva Conventions are not self-executing treaties. While they impose international law obligations on the States Parties, they do not create enforceable personal rights. Further, if they did confer enforceable personal rights, the only such rights applicable here would be under Common Article 3, which requires trials before "a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." *See Hamdan*, 548 U.S. at 630. Congress has reasonably determined that the MCA affords such a forum. 10 U.S.C. § 948b(f). Congress' decision on that matter is entitled to substantial deference, and is, in any event, correct; the MCA affords a panoply of procedural protections far exceeding those granted to any unlawful enemy combatant in the history of warfare.

[20] Appellant also argues the MCA is a bill of attainder in that it denies him the right to petition for habeas corpus, challenge the conditions of his confinement, and collaterally attack his conviction in federal court. None of those grounds affect the validity of his conviction.

Second, for the MCA provision on self-incrimination to render the law a bill of attainder, even arguably, it must deprive him of a right he would otherwise have had. Although Appellant does not say so explicitly, presumably he contends the MCA deprives him of the Fifth Amendment right against self-incrimination applicable in the Article III courts. Of course, as a captured alien enemy combatant, Appellant has no right to be tried for his war crimes in an Article III court. At most, he is arguably entitled to those rights customarily extended to enemy combatants accused of war crimes. *See, e.g.,* Rules of Procedure, Nuremberg Trial Proceedings, Vol. 1. By that standard, the MCA does not deprive him of any right.

Third, the MCA ensures Appellant a reasonable opportunity to obtain evidence. MCA Section 949j. Nothing in the Constitution prevents Congress from modifying procedural protections, including those governing the admission of hearsay and other evidence. The Supreme Court has repeatedly upheld Congress' authority to modify procedural and evidentiary trial rules and to make such modifications retroactive. *Landgraf v. USI Film Prod.*, 511 U.S. 244, 275 (1994)("While we have strictly construed the Ex Post Facto Clause to prohibit application of new statutes creating or increasing punishments after the fact, we have upheld intervening procedural changes even if application of the new rule operated to a defendant's disadvantage in the particular case.") (citing cases); *Hopt v. Utah*, 110 U.S. 574, 589 (1884) ("Statutes which simply enlarge the class of persons who may be competent to testify in criminal cases are not ex post facto in their application to prosecutions for crimes committed prior to their passage; for they do not attach criminality to any act previously done, and which was innocent when done, nor aggravate any crime theretofore committed, nor provide a greater punishment therefor than was prescribed at the time of its commission, nor do they alter the degree, or lessen

the amount or measure, of the proof which was made necessary to conviction when the crime was committed.").[21]

In conclusion, the MCA is not a bill of attainder, as it does not impose punishment on individuals. Rather, it lawfully establishes fair and robust procedures for the impartial adjudication of guilt.

VI. THE MCA DOES NOT VIOLATE THE EQUAL PROTECTION COMPONENT OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

The application of the MCA only to *alien* unlawful enemy combatants is a rational distinction when the United States is at war with foreign enemies. It does not, therefore, violate the Equal Protection component of the Fifth Amendment. The United States has historically and appropriately drawn distinctions during time of war between citizens who assist our enemies and aliens who are not members of our political community, who owe no allegiance to the United States. For example, the Continental Congress subjected spying by "all persons not citizens of, or owing allegiance to, the United States of America" to trial by military tribunals. Act of Aug. 21, 1776, 5 Journals of the Continental Congress 693 (1906). Thirty years later, when adopting new Articles of War, Congress continued the distinction between citizens (and persons owing allegiance to the United States) and others. Act of Apr. 10, 1806, 2 Stat. 371 (1806). These two examples are particular noteworthy because, as the Supreme Court has held, "contemporaneous

[21] We note that the MCA's more liberal evidentiary rules (such as greater admissibility of hearsay) do not necessarily work to an accused's disadvantage, since both parties may rely on such rules to introduce evidence. In that sense, the liberalized hearsay rules under the MCA are closely akin to retroactive procedural changes that the Supreme Court has approved in the past. *See, e.g.*, *Carmell v. Texas*, 529 U.S. 513, 546 (2000)(holding that a statute that retroactively lowered the quantum of evidence required to convict violated the Ex Post Facto Clause, but noting that rules liberalizing the *admissibility* of evidence would not: "The issue of the admissibility of evidence is simply different from the question whether the properly admitted evidence is sufficient to convict the defendant.").

legislative exposition of the Constitution when the founders of our Government and framers of our Constitution were actively participating in public affairs, long acquiesced in, fixes the construction to be given its provisions." *Hampton v. United States*, 276 U.S. 394, 412 (1928)(citing *Myers* v. *United States*, 272 U.S. 52, 175 (1926) and cases cited).

Moreover, in both World War I and World War II, the United States prosecuted alien enemies by military commissions under circumstances in which citizens assisting those enemies were prosecuted in civilian court. In a time of war, the federal government must use force to prevent the enemy, whether a foreign state or a terrorist organization, from threatening the security of the nation. In doing so, it is rational for Congress to distinguish between citizens and enemies in the use of force, as well as in its decision about detention and the punishment of war crimes.

A. CONGRESS' CLASSIFICATION OF ALIEN ENEMY COMBATANTS IS WITHIN THE FEDERAL GOVERNMENT'S BROAD ABILITY TO CONTROL FOREIGN AFFAIRS AND SUBJECT TO GREAT DEFERENCE BY THIS COURT.

The Supreme Court has made clear that, in both war and peace, *federal* policies regarding aliens are subject to great deference. *E.g.*, *Nyquist v. Mauclet*, 432 U.S. 1, 7 n.8 (1977) ("Congress, as an aspect of its broad power over immigration and naturalization, enjoys rights to distinguish among aliens that are not shared by the states."); *Mathews v. Diaz,* 426 U.S. 67, 80 (1976)("The fact that an Act of Congress treats aliens differently from citizens does not in itself imply that such disparate treatment is "invidious."). This power comes as an aspect of the federal government's broad ability to control foreign affairs, immigration, and naturalization. As the Supreme Court has repeatedly observed:

> [T]he responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government … "[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference."

Diaz, 426 U.S. at 81 & n.17 (second alteration in original) (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952)); *see also Fiallo v. Bell*, 430 U.S. 787, 792 (1977).

Appellant claims the MCA's jurisdiction provision is subject to heightened, i.e., strict, scrutiny, citing *Graham v. Richardson*, 403 U.S. 365 (1971). Brief for Appellant at 37. He argues "'Both equal protection and due process emphasize the central aim of our entire judicial system – all people charged with crime must, so far as the law is concerned, stand on an equality before the bar of justice in every American court.'" *Id*. (quoting *Griffin v. Illinois*, 351 U.S. 12, 37-38 (1956)).

This assertion, however, misses the mark, as *Graham* stands for the unremarkable proposition that discrimination in administering *state* welfare programs based on the classifications of *resident* aliens, voluntarily in the United States, will be strictly scrutinized. Nothing in this, or any other, case cited by Appellant suggests the Supreme Court meant to require heightened scrutiny for claims against the *federal* Government by *nonresident* alien enemy combatants captured abroad and held outside the sovereign borders of the United States.

The Supreme Court itself rejected extension of these precedents to the claim advanced by the petitioners in *Verdugo-Urguidez*. 494 U.S. at 271 ("These cases, however, establish only that

aliens receive constitutional protections when they come within the territory of the United States and develop substantial connections with this country."); *see also In re Griffiths*, 413 U.S. 717, 722 n.11 (1973) ("We did not decide in *Graham* nor do we here whether special circumstances, such as armed hostilities between the United States and the Country of which an alien is a citizen, would justify the use of classification based on alienage."). As *Verdugo-Urquidez* makes clear, nonresident aliens lacking substantial voluntary connection to the United States are *not* similarly situated to U.S. citizens. Congress may, therefore, properly distinguish them from citizens in the exercise of its war powers. Furthermore, while courts have consistently held strict scrutiny applies to *state* classifications of aliens, the same courts have held, with equal fervor, that *federal* classifications based on alienage are subject only to the more deferential rational basis review. *See United States v. Montenegro*, 231 F.3d 389, 395 (7th Cir. 2000) (congressional classifications based on alienage subject to rational review); *Rodriguez v. United State*, 169 F.3d 1342, 1347 (11th Cir. 1999) (same).

Arguments similar to Appellant's have been advanced by alien defendants accused and convicted of violating 18 U.S.C. §1203, the Hostage Taking Act. Congress enacted that law to implement the International Convention against the Taking of Hostages, with the belief that kidnapping involving foreign nations had serious international ramifications. As enacted, the law applied only to aliens. Aliens have challenged the law, arguing it denies them equal protection by impermissibly discriminating on the basis of alienage, and is subject to strict scrutiny. In one such case, the Ninth Circuit clearly laid out the scope of Congress' power, and the appropriate level of judicial review. The court said, "[t]he same principles that animate both the Constitution's grant of plenary control over immigration legislation to Congress and the

attendant low level of judicial review of such legislation dictate a similarly low level of review here, where **foreign policy interests are strongly implicated.**" *United States v. Lopez-Flores*, 63 F.3d 1468, 1473-74 (9th Cir. 1995)(emphasis added). *See also United States v. Ferreira*, 275 F.3d 1020, 1025 (11th Cir. 2001) (rejecting appellants attempt to distinguish a criminal conviction under the Hostage Taking Act, noting Congress enjoys broad classification authority over aliens). Every circuit court of appeals that has confronted this issue has agreed that rational basis review is appropriate. *E.g. Montenegro*, 231 F.3d at 395 (concluding the Hostage Taking Act survives rational basis review); *United States v. Santos Riviera*, 183 F.3d 367, 373 (5th Cir. 1999)(same); *United States v. Lue*, 134 F.3d 79, 87 (2nd Cir. 1998)("As long as the Hostage Taking Act is rationally related to a legitimate government interest it satisfies principles of equal protection in this context.").

B. CONGRESS' CLASSIFICATION OF ALIEN ENEMY COMBATANTS SATISFIES THE RATIONAL BASIS TEST, AND IS JUSTIFIED BOTH HISTORICALLY AND BY WARTIME PRACTICALITIES.

The strong foreign policy implication associated with the war on terror, coupled with the Court's recognition of Congress' power to enact legislation pertaining to its war powers, dictates the MCA's alienage distinction be reviewed under the deferential rational-basis standard. Determining whether legislation has a rational-basis requires a two step analysis. First, the court must identify a legitimate government purpose for the legislation. Second, the court must ascertain whether there is a rational basis to believe the legislation furthers that legitimate governmental purpose. *United States v. Ferreira*, 275 F.3d at 1026 (citing *Joel v. City of Orlando*, 232 F.3d 1353, 1358 (11th Cir. 2000)).

Pointing to the legislative history of the MCA, Appellant argues the alienage distinction was simply an attempt to avoid political responsibility. Brief for Appellant at 38. Whether true or not, this point is unavailing. Under rational basis review, a legislative enactment survives if the reviewing court can conceive of a legitimate governmental purpose. The *actual* motivations of the legislature are entirely irrelevant. *Ferreira*, 275 F.3d at 1026. A foreign terrorist organization, al Qaeda, has declared war on the United States and waged a sustained and bloody armed campaign against the United States, its people and its interests around the world. Al Qaeda has chosen to wage this war by terroristic and unlawful means, in violation of the law of war. Congress, in the exercise of its constitutional powers to provide for the common defense, declare war, define and punish offenses against the law of nations, and provide the Commander-in-Chief with the necessary and proper tools to wage war, has enacted the MCA as a tool in the war against al Qaeda. Clearly, the national security of the United States is a legitimate government interest. Further, in this conflict with al Qaeda, it is appropriate for the Government to distinguish between aliens and citizens in the very act of defending the Nation from its enemies and punishing violations of the law of war. Consequently, distinctions between citizens and aliens that might be inappropriate with respect to ordinary domestic criminal matters are rational and appropriate in the context of punishing and deterring war crimes.

The basis for the Supreme Court's deference to the political branches in this area – that "the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government," *Diaz*, 426 U.S. at 81 & n. 17 – is magnified in the present case, which involves the regulation of aliens held as enemy

combatants, thus implicating grave war powers, national security, and foreign policy concerns. As the Court recognized in *Eisentrager*,

> [E]ven by the most magnanimous view, our law does not abolish inherent distinctions recognized throughout the civilized world between citizens and aliens, nor between aliens of friendly and of enemy allegiance, nor between resident enemy aliens who have submitted themselves to our laws and nonresident enemy aliens who at all times have remained with, and adhered to, enemy governments.

339 U.S. at 769 (footnote omitted). Additionally, the Court noted, "The years have not destroyed nor diminished the importance of citizenship nor have they sapped the validity of a citizen's claim upon his government for protection." *Id*.

Distinctions between citizens and aliens drawn by Congress and the President are wholly appropriate when the United States is at war with foreign foes. In a time of war, the Government must use force to prevent the enemy, whether a foreign state or terrorist organization, from harming American lives and property. To do so, the Government may properly draw distinctions between citizens and enemies in using force, as well as in detentions and punishment.

The United States has historically drawn distinctions between alien enemies and citizens who join and assist our enemies. Citizens who assist foreign enemies are not identically situated to aliens lacking even the slightest duty of allegiance to the United States. The Constitution distinguishes between alien enemies and citizens who assist, by defining the act of treason, recognized under federal law, and creating an offense with a penalty up to death for citizens and others *with a duty or allegiance* to the United States, who levy war or provide aid and comfort to the enemy. Justice Scalia described these historical distinctions in the course of dissenting in *Hamdi v. Rumseld*, 542 U.S. 507 (2004):

> In both the current and in past armed conflicts, the United States has distinguished between citizen and enemy combatants, including in the use of federal courts or military commission trials. Two American Citizens alleged to have participated during World War I in a spying conspiracy on behalf of Germany were tried in Federal Court. *See United States. V. Fricke*, 259 F. 637 (S.D.N.Y. 1919); *United States v. Robinson*, 259 F. 685 (S.D.N.Y. 1919). **A German member of the same conspiracy was subjected to military process.** *See United States ex rel. Wessels v. McDonald*, 265 F. 754 (E.D.N.Y. 1920). **During World War II, the famous German saboteurs of *Ex Parte Quirin*, 317 U.S. 1 (1942), received military process, but the citizens who associated with them (with the exception of one citizen-saboteur) were punished under the criminal process.** *See Haupt v. United States*, 330 U.S. 631 (1947); *see also Cramer v. United States*, 325 U.S. 1 (1945).

Hamdi, 542 U.S. at 560 (Scalia, J., dissenting)(emphasis added). Although a majority in *Hamdi* held that a citizen enemy combatant could be subject to military detention (just as the Court in *Quirin* had held a citizen could be subject to prosecution by military commission, *see Quirin*, 317 U.S. at 37-38), no member of the Court disputed that citizens historically had been treated differently from alien enemy combatants. Similarly, no member of the Court disputed that such historical distinction between citizens and alien enemies was fully consistent with the equal protection principles of the Constitution. Evidence of this distinction continues to this day without question from the courts. Shortly after September 11, 2001, the United States distinguished alien enemy combatants detained at Guantanamo Bay from citizen enemy combatants, such as Yaser Hamdi, Jose Padilla, and John Walker Lindh, who were subject to military detention in the United States followed, in the latter two cases, by prosecution before Article III courts.

The distinctions are rational, not only in the light of history, but also based on the practicalities of war. The threat posed by al Qaeda and its affiliated organizations to national security is fundamentally that of an armed conflict against a foe that is essentially foreign. Such a threat, ultimately foreign in nature, renders the distinction between citizen and alien no less

inevitable in war than in immigration law. Thus the equal protection component of the Due Process Clause requires only that Congress have a rational basis for drawing a distinction between citizens and aliens in the MCA; the distinction drawn by the MCA is indeed rational.

Nothing in the Constitution requires that aliens and citizens be accorded the same treatment with respect to illegal acts of war against the United States. *See Harisiades*, 342 U.S. at 586 ("Under our law, the alien in several respects stands on equal footing with citizens, but in others has never been conceded legal parity with the citizen. . . So long as the alien elects to continue the ambiguity of his allegiance his domicile here is held by a precarious tenure."). Similarly, the Constitution permits Congress to approach the punishment of enemy combatants who violate the law of war in a piecemeal fashion – legislating only with respect to *alien* unlawful enemy combatants in the MCA, and reserving any legislation with respect to citizen enemy combatants for a later day. *See Williams v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955)("The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind."). Furthermore, Congress does not violate equal protection simply because it fails to addresses every possible concern. *See id*. (Equal Protection Clause does not forbid a state to restrict one elected officeholder's candidacy for another elected office unless and until it places similar restrictions on other officeholders). *See also McDonald v. Board of Election Comm'rs*, 394 U.S. 802, 808-09 (1969)("[A] regulation is not devoid of a rational predicate simply because it happens to be incomplete;" and "[A] legislature need not run the risk of losing an entire remedial

scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked.").

The broad power of the political branches to conduct foreign affairs, provide for the common defense, wage war, and punish offenders against the law of nations dictates that this Court accord great deference to Congress' decision to limit application of the MCA to alien unlawful enemy combatants. That distinction between citizens and enemy aliens is rational, validated by history and the practical considerations of the present threat. The MCA does not violate the equal protection component of the Fifth Amendment.

CONCLUSION

For the foregoing reasons, this Court should conclude that Appellant's five assignments of error are without merit, and affirm the findings and sentence of the military commission, as approved by the convening authority.

Respectfully submitted,

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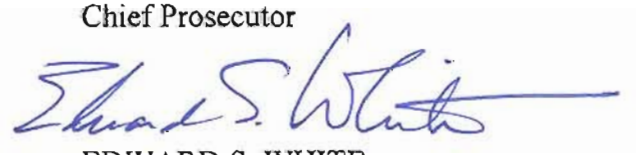
Chief Prosecutor



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